STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs No. 118351

JESSIE B. JOHNSON,

Defendant-Appellant.
/

Lower Court No. 92-115185-FH
Court of Appeals No. 219499

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN THE SUPPORT OF THE APPELLANT, THE PEOPLE OF THE STATE OF MICHIGAN

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STATEMENT OF JURISDICTION

Amicus adopts the People's jurisdictional statement.

STATEMENT OF QUESTION

I. A defense barring criminal charges against a defendant must stem from the Constitution, a controlling statute, or the common law. The defense of entrapment stems from judicial qualms about law enforcement techniques, rather than from any recognized source of law. Should Michigan abrogate the defense of entrapment, and leave the matter to the Legislature?

The trial court did not address this question.

The Court of Appeals did not address this question.

Amicus says: *Yes.*

STATEMENT OF FACTS

Amicus relies upon the People's statement of facts.

ARGUMENT

I.

A DEFENSE BARRING CRIMINAL CHARGES AGAINST A DEFENDANT MUST STEM FROM THE CONSTITUTION, A CONTROLLING STATUTE, OR THE COMMON LAW. THE DEFENSE OF ENTRAPMENT STEMS FROM JUDICIAL QUALMS ABOUT LAW ENFORCEMENT TECHNIQUES, RATHER THAN FROM ANY RECOGNIZED SOURCE OF LAW. MICHIGAN SHOULD ABROGATE THE DEFENSE OF ENTRAPMENT, AND LEAVE THE MATTER TO THE LEGISLATURE.

> *But the serpent said... "[Y]our eyes will be opened and you will be like God, knowing good and evil.*
>
> *GENESIS*, 3:4-5.

In this case, the Court once again confronts the recurring question of the burden each of us bears for our own actions, and the extent to which the Government may, like the serpent of *Genesis*, offer "temptation" to its citizens. *Amicus* submits that our system of Laws must, as a fundamental postulate, assume that each citizen is responsible for his own conduct, and that our system of government cannot permit the Judiciary to veto actions of the Executive which it does not endorse, but which do not violate the Constitution or any provision of enacted law.

Accordingly, for a variety of reasons, it follows that the trial court erred in dismissing the underlying prosecution, and this Court's proper course is to reverse the order of dismissal, and remand the cause for trial.

A. *Genesis* overruled.

1. Entrapment and the Common Law

The notion that we all bear legal responsibility for our actions is deeply ingrained in the Law. While Society has long since abandoned the notion that we all act entirely at our peril,[1] notions of fault and moral blameworthiness have always weighed heavily upon Anglo-American jurisprudence.[2] In large measure, much of the Law's moral power comes from the notion of the State as the vindicator of some universally-held, if dimly understood, Common Standard. And, quite aside from the practical function of presenting the public peace by claiming the sole legitimate right of vengeance against wrongdoers, the Law serves the philosophical end of giving some objective measure of conduct to its citizens, by which to judge their conduct. While relegating perfection to a law beyond human design, the Law provided a minimum level of common decency below which one could not sink — at least, not without incurring punishment.

Inevitably, such a standard would need to be external and objective: a free society does not, after all, punish people for their thoughts, but for their deeds. And, as Holmes noted, "[f]or the most part, the purpose of the criminal law is only to induce external conformity to rule."[3] It follows, therefore, that while the Law's legal standards may well adopt those of the community at large — which were "found in the concept of the average man," possessed of "ordinary intelligence and prudence"[4] — the Law would command each citizen to have such qualities at our own peril,

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[1]Holmes, THE COMMON LAW, 82-107 (Little, Brown, 1923).

[2]Holmes, at 49-51.

[3]Holmes, at 49.

[4]Holmes, at 50-51.

assuming that every one of us "is as able as every other" to obey the law.[5] That such requirements would fall with unequal burden is undeniable — but also an unavoidable consequence of the rule of law. As Holmes observed:

> It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where they law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scale.[6]

Against this background, the modern doctrine of entrapment was slow to take root, as it ran against a number of deeply-held notions of personal responsibility and cultural teachings at the core of Anglo-American jurisprudence. Temptation being an unavoidable price of existence, courts traditionally focused on the objective act itself, rather than its source, reasoning that as an objective measure of behavior the Law should "not look to see who held out the bait, but who took it."[7] Moreover, the recognition that the acts of another were never an excuse for one's own wrongdoings was a cornerstone of Western civilization: the first rejection of the entrapment defense comes in the Book of Genesis,[8] and in the early days of our own country it met a similarly hostile reception in the courtroom:

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[5]Holmes, at 50-51.

[6]Holmes, at 48.

[7]*People v Mills*, 178 NY 274; 70 NE 786 (1904).

[8]GENESIS, 3:12-24.

> That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any court of civilized...ethics, it never will.[9]

Still, given the moral fervor of the American republic,[10] the idea of the State as both teacher and moral exemplar is difficult to resist, and uneasiness over governmental entanglements in the less savor aspects of law enforcement proved inevitable. Though not sanctioning the defense itself, one of the early precursors of the entrapment defense carries overtones of future judicial efforts to limit

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[9]*Board of Commissioners v Backus*, 29 How Pr 33 (NY Sup, 1864).

[10]Actually, Defeo describes the entrapment defense as "a purely American anomaly," and a recent one at that — noting that the defense is still rejected in England. But he also recognizes that British law is far more permissive than America's in the areas of narcotics, prostitution, homosexuality — in short, in the whole area of vice crimes, which by their consensual nature lack a true complainant, and are therefore often enforceable only through undercover informants or police spies. Defeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory, and Application*, 1 SAN FRAN L REV 243, 244, 250-251 (1967). Other commentators have also noted the likely connection. *See, eg*, Park, *The Entrapment Controversy*, 60 MINN L REV 163, 220 n 223 1973); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provacateurs*, 60 YALE L J 1091, 1092-1094 (1951).

Writing in the middle of the last century, Mikell noted that "[n]one of the English writers on criminal law, ancient or modern, mentions entrapment as a defense to a charge of crime," and that "entrapment as an excuse" appears to be "a purely American doctrine." Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 PA L REV 245, 245-246 (1942). In large measure, this may reflect the tradition of Blackstone: "That the king can do no wrong," he wrote, "is a necessary and fundamental principle of the English constitution." Blackstone, 3 COMMENTARIES ON THE LAWS OF ENGLAND, 254 (1768). But at least one American has been tempted to wonder whether the rise and continued acceptance of this "purely American doctrine"is rooted in the converse principle, universally advanced as a self-evident general proposition by the American criminal defense bar, that in this republic, "the king can do no right."

the investigative practices of the Executive. And in the case of *Saunders v People*, [11] Justice Marston expressed an almost modern concern about the conduct of criminal investigations:

> The course pursued by the officers in this case was utterly indefensible. Where a person contemplating the commission of an offense approaches an officer of the law, and asks his assistance, it would seem to be the duty of the latter, according to the plainest principles of duty and justice, to decline to render such assistance and to take such steps as would be likely to prevent the commission of the offense, and tend to the elevation and improvement of the would-be criminal, rather than to his further debasement.[12]

For good or ill, a hundred years later Justice Marston's concerns would rule the day,[13] and courts would try to enjoin the police to set a positive example, rather than merely to enforce the law. And the doctrine of entrapment would serve as an exception to the general rule of personal responsibility, as an idealistic expression of judicial concern over the dangers of abusive executive

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[11] *Saunders v People*, 38 Mich 218, 221-222 (1878).

[12] Ironically, as we shall later see, the Defendant in this case is accused of doing precisely what Justice Marston condemned in *Saunders*: Defendant, a police officer, is charged with assisting another who was ostensibly a drug dealer trying to commit a crime. It is a symptom of the internal contradictions inherent in the defense of entrapment — and, perhaps, of the faulty logic afflicting segments of our system of justice — that an accused can seek to defend against a criminal charge not by showing that he did not do what the police say he did, but that being a police officer himself, it was not his fault that he did not immediately arrest the person who asked him to commit a criminal act and instead joined in the attempt to profit by breaking the law: rather, it was entirely the fault of the person who asked him.

[13] In 1980, in the case of *State v Jones*, 598 SW2d 209 (Tenn, 1980), Tennessee became the last jurisdiction in the United States to recognize the defense of entrapment.

power[14] — with the practical effect that many prosecutions would become inquiries into the conduct of the police, rather than the behavior of the accused.

2. Entrapment Meets Prohibition

The modern doctrine of entrapments began with the case of *Sorrells v United States*:[15] the defendant, accused of violating the Prohibition laws by supplying an undercover federal agent with whiskey, claimed that the agent enticed him into delivering the liquor by posing as a comrade-in-arms from World War I, and asking "three or four or probably five times" for the whiskey.[16] The court found that the defendant "had no previous disposition" to commit the crime, but was an "industrious, law-abiding citizen" who was lured into committing the crime by the federal agent's "repeated and persistent solicitation in which he [the agent] succeeded by taking advantage of the

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[14]*But see*, Thoreau, WALDEN 80 (Easton Press, 1981): If I knew for a certainty that a man was coming to my house with the conscious design of doing me good, I should run for my life...."

[15]*Sorrells v United States*, 287 US 435; 53 S Ct 210; 77 L Ed 413 (1932).

Actually, the doctrine traces its roots to the state courts of the late Nineteenth Century, and one can trace its spread by looking at a single source: Entrapment finds no mention in the literature until 1880, when Wharton's Eight Edition simply declared that it was not a defense. Wharton, 1 CRIMINAL LAW (8th Ed) 142 (1880). But by the turn of the century it had spread like wildfire, and Wharton's Tenth Edition proclaimed that "the government is precluded from asking that the offenders thus decoyed should be convicted," since they were "associated with the government in the commission of the crime, and the offense being joint, the prosecution must fail." Wharton, 1 CRIMINAL LAW (10TH ED) 166 (1896). This growing state court acceptance gradually infiltrated the federal system, and following the decision in *Sorrells*, the states have largely followed the lead of the federal courts.

See, Defeo, *supra* at 247-252 for a good history of the doctrine's early development. *See also*, LaFave & Scott, 1 SUBSTANTIVE CRIMINAL LAW §5.2, 597-599 (1986) and Marcus, *The Development of Entrapment Law*, 33 WAYNE L REV 5 (1986).

[16]*Sorrells*, at 440.

sentiment" roused by reminiscing about their common experiences in the Great War.[17] Recognizing that the business of law enforcement often required tools of "[a]rtifice and stratagem," and that there was nothing with the government "merely afford[ing] opportunities or facilities for the commission of an offense,[18] the Court nevertheless found a fundamental difference between governmental conduct designed to outwit a criminal, and conduct which did no less than "implant in the mind of an innocent person the disposition" to commit a crime — and then proceed to induce the crime itself, in order to have something to prosecute.[19] The Court had little trouble concluding that the latter conduct was a "gross abuse of authority,"[20] but found itself troubled by the notion of "judicial nullification" that simply refusing to enforce the law would imply.[21] And so it felt compelled to reach for a more tenable rational to justify judicial intrusion into the mechanics of law enforcement. That justification — the subject of much comment and criticism — was the rationale of judicial construction.

Speaking for the Court's majority, Chief Justice Hughes squarely confronted the paradox that the defendant was, in essence, seeking to excuse his own admitted wrongdoing by asking the Court to look instead at the misconduct of someone else.[22] And noting that clemency was the "function

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[17]*Sorrells*, at 441.

[18]*Sorrells*, at 441.

[19]*Sorrells*, at 441-442.

[20]*Sorrells*, at 441.

[21]In point of fact, one authority cites the perceived lack of authority as the major reason why England has rejected entrapment for so long. G Williams, CRIMINAL LAW: THE GENERAL PART (2ND ED) §256, 784 (1961).

[22]*Sorrells*, at 445-446.

of the Executive," the Chief Justice wrote that the assumption of an "implied judicial power" to ignore the Legislature's command that certain conduct be punished would, inevitably, "result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced."[23] But the Court also recognized the obvious injustice of punishing an otherwise blameless defendant, who committed his crime only at the urgings of agents of the government, and whose punishment called into question the very purpose of the Law. And finding practices from the realm of civil law to be inapplicable,[24] the Court faced the dilemma of arrogating to itself the supreme, dictatorial power of nullification — which would violate the Constitutional doctrine of separation of powers — or else allowing an injustice to go uncorrected by enforcing a statute under circumstances alien to the fundamental purpose of the criminal law: protecting the innocent and punishing the guilty. It resolved this problem by confining its analysis to an area which all conceded was well within the Judiciary's jurisdiction — treating the problem as one of simple statutory construction. Thus, noting the widespread condemnation of overly literal interpretations of statutes in circumstances which would produce "absurd consequences or flagrant injustice,"[25] the Court seized upon a polite fiction to achieve what it perceived as justice, in a manner calculated to spare

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[23]*Sorrells* at 449, citing *Ex Parte United States*, 242 US 27, 42; 37 S Ct 72; 61 L Ed 129 (1916).

[24]The Court's reasoning revealed its profound awareness of the intrinsic limitatinos placed upon the Judiciary in a system of separated powers: "When courts of law refuse to sustain allegec causes of action, which grow out of illegal schemes, "wrote Chief Justice Hughes, the applicable law itself denies the right to recover. Where courts of equity refuse equitable relief because complainants come with unclean hands, they are administering the principles of equitable jurisprudence....But in a criminal prosecution, the statue defining the offense is necessarily the law of the case." *Sorrells*, at 450.

[25]*Sorrells*, at 446.

all concerned from an otherwise insoluble institutional tangle: Congress could not have intended to use its powers to imprison innocent people through the use of abusive enforcement practices by the Government, the Court reasoned; and, therefore, absent a clear indication to the contrary, courts should not construe the Law in such a way as to include otherwise innocent people whom the Government lured into committing a crime simply to punish them:

> If the requirements of the highest public policy...would preclude enforcement of the statute in such circumstances as are present here, the same considerations justify the conclusion that the case lies outside the purview of the Act and that its general words should not be construed to demand a proceeding at once inconsistent with that police and abhorrent to the sense of justice. This view...obviates the objection to the exercise by the court of a dispensing power in forbidding the prosecution of one who is charged with conduct assumed to fall with the statute.[26]

In this way, by paying due deference to the Legislative prerogative to overrule the Court's construction by way of legislation — and to the Executive's sole power to grant clemency — the Court managed to weave its way through the obstacles caused by the apparent abuse of executive power by using its own conceded powers of statutory construction.[27] And to establish a case of

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[26]*Sorrells*, at 448-449.

[27]While the minority dismissed this reasoning as simply a new method of rationalizing the defense, the approach was far more subtle. As Mikell observed:

> It does more than rationalize it: it denies its existence. It is not an application of that doctrine [of entrapment], but the application of another — the most fundamental of the criminal law, namely, that one shall not be convicted of a crime when the act done by him was not unlawful — for if the statute did not apply to the facts of the case, the defendant was privileged t sell liquor to the officer and hence his act in so doing was not unlawful. This view, that the most flagrant abuse of authority by an officer in instigating a crime furnishes no excuse if the crime is committed, is undoubtedly in accord with the general principles of the criminal law. In the nature of things, there can be no defense to a crime

entrapment — thereby bringing the case out of the reach of the applicable penal statute — the defendant would have to show two basic elements: first, that the government had originated the crime and induced him to commit it; and secondly, that the defendant was an "otherwise innocent person," of the sort who would not have committed the crime unless induced. Still, the approach was not without a fundamental flaw: for at the heart of the decision in *Sorrells* was no real doubt about the wording of the statute, but rather an underlying moral revulsion at the prospect of a government enticing its own citizens into a crime for which it then demanded punishment. And however deferential the Court's "polite fiction" was in its expression, it was in fact, if not in form, exercising either the Executive function of clemency by excusing a lawbreaker's direct violation of the law, or else the Legislative function by rewriting the governing statute by judicial fiat. And aside from sanctioning "[a]rtifice and stratagem" which extended not further than offering "opportunities

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> committed. The so-called "defenses" of the criminal law are not defense to crime:...if established, they disprove some necessary element....It would seem, therefore, that the court was on solid ground in repudiating the doctrine of entrapment, a necessary element of that doctrine being that the defendant has committed the crime with which he was charged.
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> Mikell, *supra* at 254-255.

Unfortunately, if the Court's intention was to discourage police misconduct, the approach may have been too subtle by half: a jurisdiction which has a solicitation statute prohibiting one from inciting or inducing a crime could enforce the Law — and vindicate the Rule of Law — by punishing the entrapping officer who enticed an honest citizen into committing a crime, *cf.* Mikell, *supra* at 263-264, while prosecuting the citizen, if at all, with a humbling recognition of his own lessened culpability. But viewing entrapment as negating the commission of a crime would absolve the entrapping officer from what would be otherwise indefensible criminal liability. This has the unfortunate side effect of seeing the Court decriminalizing conduct which it is, at the seame instant, declaring to be against public policy — thereby eroding the Legislature's position as arbiter of Public Policy just as surely as the "judicial nullification" approach would do, by in a way which passes largely unnoticed.

or facilities" for committing a criminal offense,[28] the majority was resoundingly silent on the ways in which a Government could avoid an entrapment claim by an already-predisposed criminal who merely took the bait. Moreover, treating the conduct as falling outside the scope of the statute meant that the Court had to reject the government's suggestion of a plea in bar, with the procedural consequence that the contested matter became a question of fact — while the underlying thrust of the defendant's position was that, though guilty enough of the charged offense, he sough to establish facts which would bar the prosecution regardless of his guilt or innocence.

Confronting the basic weaknesses in the majority opinion, Justice Roberts defined the problem as on of basic judicial integrity.[29] Defining "entrapment" as the "conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it,"[30] Justice Roberts proclaimed the view that "public policy forbids such sacrifice of decency," and that the courts should — and could — close their doors to the trial of a crime "instigated by the government's own agents."[31] It did no good, in his view, to search for an

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[28]*Sorrells*, at 441.

[29]Despite questions about the propriety of judicial nullification, and the risks of permitting the Judiciary to arrogate to itself the role of setting public policy, this is the approach favored by most of the commentators. *See, eg.* Donelly, *supra* at 1114-1115; LaFave & Scott, SUBSTANTIVE CRIMINAL LAW, at 601; Goldstein, *Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L J 683 (1975), and Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORD L REV 399 (1959).

For a sampling of the contrary view, see Defeo, *supra*; Park, *The Entrapment Controversy*, 60 MINN L REV 163 (1976); and Rossum, *The Entrapment Defense and the Teaching of Political Responsibility*, 6 AM J CRIM L 2287 (1978).

[30]*Sorrells*, at 453 (Concurring opinion of Roberts, J.)

[31]*Sorrells*, at 459 (Concurring opinion of Roberts, J.).

"unspoken or implied mandate" in the statute to be judged "not guilty by reason of someone else's improper conduct,"for the majority's approach ignored the plain fact that whatever the inducement, the defendant's actions nevertheless fell "within the letter of law," rendering him "amenable to its penalties."[32] And this made it little more than hypocrisy to pretend that the real reason for the majority's decision was some previously undivined intent of Congress to exempt those lured to commit their crimes by agents of the Government. Instead, Justice Roberts wrote:

> The doctrine [of entrapment] rests...on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law.[33]

However, though its own weaknesses are different, the minority view suffers from a flaw as fundamental as the majority's — for at its heart is a radical reassessment of the relative balance of power at the heart of the Constitution, and a fundamental — though oddly unremarked — rejection of the supremacy of Law: The Constitution granted to Congress the power to make rules governing the conduct of society's affairs, the President the power to execute the laws and enforce the decrees, and to the courts only the right of rendering judgment according to the laws.[34] But where the *Sorrells* majority payed polite, if passing deference to the Legislative prerogative to set public policy, the minority seized this right for the Judiciary, by proclaiming a "chancellor' foot veto" over

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[32]*Sorrells*, at 456 (Concurring opinion of Roberts, J.).

[33]*Sorrells*, at 457 (Concurring opinion of Roberts, J.).

[34]US Const, Art I, §§1-2; Art II, §1; Art III, §1. *See*, THE FEDERALIST, No 78.
In Michigan, one finds the corresponding separation of powers in Const 1963, Art III, §2, which is even more specific that its Federal counterpart.

executive practices it considered odious, but which Congress had not undertaken to halt.[35] Moreover, by sanctioning the excuse of temptation — if occasioned by the Government, rather than some private party[36] — the minority's view would alter the foundations of the criminal law in three basic ways: first, by undertaking to treat different defendant's differently, on grounds unrelated to their personal conduct; secondly, by determining that collateral questions, beyond that of whether the accused had shown obedience to the Law, would be paramount in determining the question of guilt; and lastly, by elevating questions of enforcement methods to supercede the obedience to the Law, without the concurrence of the legislative body charged with setting public policy. IN effect, the minority view was that courts should undertake to consider and resolve two separate and severable questions — *ie*, the guilt of the accused, and the proper response to allegations of official misconduct — with a single judgment in a single proceeding.[37] By dispersing the focus of the courts in such a manner, however, the minority would begin to use the judicial forum to debate and resolve questions of social policy, which in turn would divert the courts from their own constitutional

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[35]Mikell, in fact, viewed the notion that a court would even *consider* refusing to enforce a constitutionally-enacted statute on grounds that its enforcement would be against "public policy" to be a "startling doctrine." After all, in a society priding itself on the Rule of Law, he was of the the belief that there could be "no higher public policy than that all men should obey the law." Mikell, *supra* at 260-26.

[36]Even to this day, the entrapment defense is unavailable if the tempter's conduct is not in some way attributable to the government. *See, eg,* LaFave & Scott, SUBSTANTIVE CRIMINAL LAW at 598-599.

[37]Today, of course, this approach has come to be used to resolve a wide range of issues in the field of criminal law, with decidedly mixed results. It does, however, remind at least one observer of the comment of one ancient sage: "To do two things at once is to do neither." Publilius Syrus, *Maxim 7.* Mikell's approach, on the other hand, would have greatly simplified the court's task: he would prosecute the entrapping officer, permitting the court to concentrate on one person's conduct at a time. Mikell, *supra* at 264-265.

mission — peacefully settling legal disputes in a manner consistent with the needs and demands of the community.[38]

Thus, though both approaches sought to address a real and growing problem, each contained an inherent flaw which, as with many things, would become the root of new problems. And as each suffered its own intrinsic theoretical and practical weaknesses, the future development of entrapment would lead to widespread difficulties in application, and a wide divergence in approaches as the law evolved.

B. The Nature of Entrapment as a Defense.

As the prevailing rational for the entrapment defense finds its roots in the court's powers of statutory construction,[39] it follows that the defense itself is not of constitutional dimension.[40] Accordingly, each jurisdiction is free to adopt whatever procedures it chooses to regulate the problem of police overreaching, or governmental involvement in criminal enterprises. Given the theoretical limitations of the two strands of the *Sorrells* decision, it is not surprising that the doctrine of entrapment has seen a host of inconsistent applications throughout the country. And for the most part, these inconsistencies have largely stemmed from whether a particular court, in a particular case, has chosen to be governed by one set of limitations or the other. Even so, upon study, we can discern a few basic principles, to help us understand the core of the defense.

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[38]*See,* Holmes, at 42.

[39]LaFave & Scott, CRIMINAL LAW, 369 (1972) §48

[40]*United States v Russell,* 411 US 423, 433; 93 S Ct 1637; 36 L Ed 2d 366 (1973). See also, 21 AM JUR 2D, *Criminal Law* 369-370, §203.

Since the basic premise of the defense is the injustice of the government punishing one for conduct caused by governmental enticements, entrapment itself is "defined in terms of inducements which create a substantial risk that the offense will be committed by persons other than those who are ready to commit it,"[41] and the defense does not extend "to acts of inducement on the part of a private citizen" who is not the agent of the police.[42] Accordingly, the Model Penal Code would refine the classic notion of "entrapment" to require both official misconduct, and a substantial risk of harm to the community:

> A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such an offense by...employing methods which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.[43]

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[41]LaFave & Scott, CRIMINAL LAW, at 369.
This was essentially the test this Court adopted in *People v Jamieson.*

[42]LaFave & Scott, SUBSTANTIVE CRIMINAL LAW, at 599. *See also, United States v Manzella,* 791 F2d 1263 (CA 7, 1986)(Noting that there is "no defense of private entrapment"); *United States v Cruz,* 783 F2d 1470 (CA 9, 1986); *State v Agrabante*, 73 Haw 179; 830 P2d 492 (1992); *State v Jones*, 231 Neb 47; 435 NW2d 167 (1989); *Melton v State*, 713 SW2d 107 (Tex Crim pp, 1986). *See generally, United States v Jones*, 213 F3d 508 (CA 9, 2000)(Discussing factors used to determine whether entrapping person is a governmental actor).

[43]MODEL PENAL CODE, §2.13.
This formulation would include also excuse a defendant's conduct if induced by a police officer's "knowingly false representations" that the conduct induced was not against the law. MODEL PENAL CODE, §2.13(1)(a). It would not, however, excuse a defendant's acts of "causing or threatening bodily injury" — so long as the violence at issue is directed at one "other than the person perpetrating the entrapment." MODEL PENAL CODE, §2.13(3).
Amicus does not know whether this latter example of entrapment reflected a considered philosophical nuance, or simply the practical recognition that some people find it hard to take "No" for an answer.

Roughly following the Supreme Court's dichotomy, courts employ two basic tests to determine entrapment — the "subjective" test, focusing on the defendant's predisposition to commit an offense;[44] and the "objective" test, which concentrates on whether the conduct of the police is "objectively" outrageous, in creating an unacceptably high risk of inducing a normally law-abiding citizen to commit the crime.[45] Both tests carry its own set of logical and practical limitations, as well as its own particular strengths and weaknesses.[46] But as each test addresses a slightly different set of concerns, the principled application of either favors neither the prosecution nor the defense — but rather guards against different dangers in slightly different ways. As one authority describes the distinction:

> Under the [subjective approach], if A, an informer makes overreaching appeals to compassion and friendship and thus moves D to seel narcotics, D has no defense if he is predisposed to narcotics peddling. Under the [objective approach] a defense would be established because the police conduct, not D's predisposition, determines the issue. Under the [subjective approach], A's mere offer to purchase narcotics from D may give rise to the defense provided D is not predisposed to sell. A contrary result is reached under the

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[44]*See, Sherman v United States*, 356 US 369; 78 S Ct 819; 2 L Ed 2d 848 (1958); *United States v Russell*, 411 US 423; 93 S Ct 1637; 36 L Ed 2d 366 (1973); *Hampton v United States*, 425 US 484; 96 S Ct 1646; 48 L Ed 2d 113 (1976).

For a more recent application of the subjective test, see the Supreme Court decision in *Jacobson v United States*, 503 US 540; 112 S Ct 1535; 118 L Ed 2d 174 (1992).

[45]*See, Sherman v United States, supra* at 384 (Concurring opinion of Frankfurter, J); *United States v Russell, supra* at 440-445. *See generally*, LaFave & Scott, CRIMINAL LAW at 371.

[46]*See* LaFave & Scott, SUBSTANTIVE CRIMINAL LAW at 597-606 for a good discussion of the comparative advantages and disadvantages of both views.

> [objective approach]. A mere offer to buy hardly creates a serious risk of offending the innocent.[47]

However, either test views the defense as limited to criminal conduct which is the "product of the creative activity of law-enforcement officials," and does not extend merely to private conduct, or to governmental conduct which "merely affords the opportunities for the commission of the offense."[48] For, as Chief Justice Warren noted in *Sherman v United States*, "a line must be drawn between the trap for the unwary innocent, and the trap for the unwary criminal."[49] And this, in turn, is because a society premised upon the Rule of Law cannot afford to disarm itself while trying to enforce the Law; as Justice Roberts noted in *Sorrells*:

> Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of the commission of crime.[50]

Whatever the differences in application or philosophy, the evil which each approach seeks to address is the abuse of governmental power to entice law-abiding citizens into conduct which the law proscribes — and this is the "outrageous" or "reprehensible" conduct which the defense seeks to deter. A defendant must show something well beyond governmental action offering the opportunity to engage in criminal activity to establish a claim of entrapment — and must show some

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[47]Model Penal Code, §2.10, Comment (Tentative Draft No 9, 1959), cited in SUBSTANTIVE CRIMINAL LAW, at 603

[48]*Sherman v United States, supra* at 382 (Concurring opinion of Frankfurter, J). *See also, Sorrells* at 441, 451 (Majority opinion), 453 (Concurring opinion of Roberts, J.).

[49]*Sherman v United States, supra* at 372-373.

[50]*Sorrells*, at 453 (Concurring opinion of Roberts, J.).

addition factor, such as excessive pressure or deliberate governmental preying upon an essentially non-criminal motive — to establish a claim of entrapment.[51] Accordingly, the defense is unavailable in circumstances in which the police conduct at issue — whatever its flaws, and however squeamish it may make the outside observer — poses no significant risk of luring the innocent into breaking the law. In jurisdictions following the "subjective" approach, this is because the defense itself is crafted to apply only to the innocent; in jurisdictions like Michigan, which apply the "objective" approach, it is due to the inherent limits of the defense itself; as Professor Donnelly noted:

> The inquiry should be directed solely to the propriety of the officer's conduct....If his conduct was no more than would induce a person engaged in an habitual course of conduct...then the defense should not be available regardless of the officers motives....On the other hand, if the officer uses inducements that would reasonably overcome the resistence of one not a chronic offender, such ans pleas of desperate illness, continued and persistent coaxing, appeals to sympathy, pity of friendship, or offers of inordinate sums of money, the court should find as a matter of law that there was entrapment.[52]

Thus, the "objective" test has but a single focus: whether the police conduct in question creates a significant risk that an citizen, not previously disposed to committing a crime, might by lured into committing a criminal act as the result of governmental enticements. This is the test the Court sought to adopt in *People v Jamieson*[53] — and is the only workable "objective" this Court has

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[51]*See, eg, United States v LaFreniere*, 236 F3d 41 (CA 1, 2001); *United States v Poehlman*, 217 F3d 692 (CA 9, 2000); *United States v McKinley*, 70 F3d 1307 (CD DC, 1995); *State v Graham*, 259 Neb 966; 614 Nw2d 266 (2000). *See also*, P Marcus, THE ENTRAPMENT DEFENSE (2ND ED, 1995), 120.

[52]Donnelly, *supra* at 1114.

[53]*People v Jamieson*, 436 Mich 61 (1990).
The *Jamieson* Court sought to discern whether the police conduct at issue "would induce

found: later pronouncements have been the source of continuing confusion and misapplication[54] — leading to the present case, where the lower courts have found "entrapment" in a situation in which a police officer assists in a drug transaction, rather than terminating it by arresting everyone involved.

As the People's fine brief demonstrates, this is a clear misapplication of present law, requiring this Court's prompt and unambiguous reversal. Before considering the merits of the current appeal, however, this Court may wish to reexamine the underpinnings of the entire defense.

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a hypothetical person," confronted with similar circumstances, who was "not ready and willing to commit crime to engage in criminal activity." *Jamieson*, at 80.

[54] *People v Juillet*, 439 Mich 34 (1991) appeared to return Michigan to the muddle this Court tried to settle in *Jamieson*: confronting a case in which one defendant, who was an habitual drug-dealer, obtained drugs for an informant who "incessantly requested drugs from all those around him," and another defendant obtained drugs for a long-standing girlfriend who had — unbeknownst to him — turned police informant, the Court found the first defendant entrapped, and remanded for a new hearing for the second one. Since a "normally law-abiding person" would reply "What !?? Are you crazy??" rather than "Yes, of course" to a simple request for drugs unaccompanied by tugs on the heartstrings, the ensuing ten years have seen nothing but a return to the pre-*Jamieson* turmoil. In point of fact, courts have largely turned away from considering the effect of the police conduct on a normally law-abiding citizen, in favor of a consideration of whether a particular judge sufficiently disapproves of what the police did in a given case to label it "reprehensible." *See, eg, People v Ealy*, 222 Mich App 508 (1997)(No "reprehensible conduct" in escalating amount of drugs defendant delivered in effort to identify source of drugs); *People v Martin*, 199 Mich App 124 (1993)(Majority deems allegation of "agreement" to pay informant upon defendant's conviction to be "reprehensible," but rejects claim as unproven; dissent would have found informant's monetary stake in outcome to be "reprehensible"); *People v Butler*, 199 Mich App 474 (1993) *rev'd* 444 Mich 965 (1994)(Act of giving defendant informant's beeper number, proposing "quick completion" of a drug deal, and expressing hope of a "long and profitable relationship" constituted "reprehensible conduct;" case holding reversed by Supreme Court); People v Williams, 196 Mich App 656 (1992)(Reversing trial court determination that sale of small amounts of controlled substance by police officer posing as drug dealers on a public street constituted "reprehensible conduct"); *People v Fabiano*, 192 Mich App 523 (1992)(Finding judicial notions of "reprehensibility" to be a separate component of Michigan's entrapment test).

C. Entrapment and the Separation of Powers

1. The Nature of Judicial Review

Since Colonial times, Americans have recognized the dangers of centralized power: our Revolution itself was, at heart,[55] a reaction to the exercise of unbridled authority, and gave rise to our doctrine of separated powers. "The accumulation of all powers," wrote Madison, "legislative, executive, and Judicial, in the same hands ... may justly be pronounced the very definition of tyranny."[56] And it was this recognition that gave rise to the American doctrine of separated powers, which finds its practical expression in our constitutions: the American model of government divides power into three separate branches — legislative, executive, and judicial — in hopes that the competing ambitions and interests of the fallible humans who occupy positions of power in our Society will provide the necessary checks and balances to keep governmental power firmly under control, and focused on useful endeavors.[57] Within limits prescribed by the people, through their adoption of a governing Constitution, the Legislative power — the power to command or proscribe — belongs to the legislative branch of government, elected by the people;[58] Executive power, the

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[55]Actually, while the philosophical justification for the American Revolution stemmed from the "long train of abuses" which gave rise to King George's "repeated injuries and usurpations" against the Colonies, *Declaration of Independence,* (1776), the historical record suggests that the success of the rebellion owed as much to the colonists' reluctance to pay the costs of protecting themselves from the French and the Indians as to any real tyranny by the Crown. *See*, Middlekauf, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789, (1982), 43-93, Trevelyan, THE AMERICAN REVOLUTION, (MORRIS ED, 1964), 1-56.

[56]THE FEDERALIST, No. 47

[57]Experience since the Revolution — or a cursory look at the Federal budget — suggests that this hope is more the worthy ideal to pursue than a practical, achievable goal.

[58]US Const Art I, §§ 1-2; Const 1963, Art IV, §1

power of action and enforcement, belongs to the executive officer at the head of a particular unit of government;[59] and the Judicial power of the courts,[60] the power of judgment, is at once the most limited, yet the most absolute — absolute in that a court's judgments become the law, yet limited by the very nature of Judicial review, in that courts may neither proscribe nor enforce, but merely render the judgment of the Law upon the controversy at bar, all within the jurisdictional limits and narrow circumstances prescribed by the political branches of government, which remain outside of Judicial control. As Hamilton explained, this interrelationship among the various branches provides a needed check on each, and limits on the power of all aspects of government:

> The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may be said to have neither force nor will but merely judgment; and it must ultimately depend upon the aid of the executive for the efficacy of its judgments.[61]

Michigan, as well, recognizes the value of diffusing political power, and the citizens have undertaken to place strict limits upon the jurisdiction of their public officials. Our state constitution creates three separate branches of government,[62] and forbids any public officer from intruding into another arm's domain:

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[59]US Const, Art II, §1; Const 1963, Art V, §1

[60]US Const, Art III, §1; Const 1963, Art VI, §1,

[61]THE FEDERALIST, No 78.

[62]Const 1963, Art IV, §1; Art V, §1; Art VI, §1.

> The powers of government are divided into three branches, legislative, executive, and judicial. No person exercising the powers of one branch shall exercise powers properly belonging to another branch, except as expressly provided in this constitution."[63]

When we consider the different roles each branch of government plays in our Society, we see that a wide discretion is the hallmark of our political branches: the essence of Legislative power is, after all, defining public policy,[64] and the entire basis of Executive power is the discretionary use of the coercive powers of government to enforce the Law.[65] Within the broad parameters set by the Constitution, these branches remain free to exercise their responsibilities in any manner not prohibited by Law, and have the discretion to bring all manner of human ingenuity to bear in their efforts to cope with the inevitably conflicting demands of a complex society. Judicial power, by contrast, has no discretion except the Law: the core judicial function is, and remains, the peaceful resolution of disputes through the application of the rules that Society adopts to govern itself. however, since the legitimacy of this function rests entirely upon the disinterested nature of the judge, the Judiciary cannot become actively involved in setting, establishing, or enforcing public policy without under-mining the impartiality which forms the basis for the institution of Judicial review — which is, in turn, the very mechanism through which all Government holds itself

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[63]Const 1963, Art III, §2.

[64]*See, eg, In re Manufacturer's Freight Forwarding* Co, 294 Mich 57 (1940); *School District No I v Lansing School District*, 331 Mich 523 (1952); *Cahalan v Wayne County Board of Commissioners*, 93 Mich App 114 (1979).

[65]*See, eg, People ex rel Ambler v Auditor General*, 38 Mich 746 (1878); *People ex rel Ayers v Board of State Auditors*, 42 Mich 442 (1890). *Cf. House Speaker v Governor*, 443 Mich 560 (1993).

accountable to the Law. Therefore, while a court's powers and duties will derive from laws and policies adopted by the representative branches of Government — or from the People themselves, speaking through their Constitution, or some form of initiative or referendum — the Judiciary itself has no independent policy-making role, and cannot assume such a role under the guise of Judicial review without undermining the structural foundations which give judges their institutional impartiality, and judicial pronouncements their democratic legitimacy.

Therefore, in our form of Government, each branch of Government has its proper function and ensuing limitations: subject only to the limits placed upon it by the Constitution, the Legislature defines public policy,[66] but has no role in its enforcement.[67] The Executive is responsible for enforcing public policy, and ensuring public health, safety, and welfare and toward that end may freely choose any of the means and tools that Nature and the Law provide[68]; but the Executive cannot render judgment, and must remain accountable to the same Law that it seeks to enforce . And while the Judiciary has neither the authority to define policy, nor the means to enforce it, courts alone render Judgment, by applying the Law to all controversies submitted for decision.[69]

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[66]*See, eg, In re Manufacturer's Freight Forwarding Co*, 294 Mich 57 (1940); *School District No I v Lansing School District*, 331 Mich 523 (1952); *Cahalan v Wayne County Board of Commissioners*, 93 Mich App 114 (1979).

[67]*See, eg,* OAG 1994, No 6811. *Cf. Farmington Township v Scott*, 374 Mich 536 (1965).

[68]Accordingly, courts have no authority to compel an executive officer to perform a discretionary act. *See, eg, People ex re Ambler v Auditor General*, 38 Mich 746 (1878); *People ex rel Ayres v Board of State Auditors*, 42 Mich 422 (1880). *Cf, Ex Parte Ray*, 215 Mich 156 (1921). *House Speaker v Governor*, 443 Mich 560 (1993).

[69]Or as Hamilton noted in THE FEDERALIST, No. 78: "[C]ourts must declare the sense of the law: and if they should be disposed to exercise WILL instead of JUDGMENT, the

Accordingly, the process of judicial review is not an exercise in policy-making, nor a means whereby the judge measures the wisdom of official actions, or exercises a veto over discretionary actions of another branch of government. While the State Constitution is the instrument which creates our courts,[70] it is the Legislature, through the exercise of its Legislative power, which establishes and controls the jurisdiction of all courts and establishes the rules by which we govern ourselves, and it is the Executive which enforces and implements all laws and judgments. If we confuse these functions — and permit judges to manage the conduct of criminal investigations, establish the substantive rules of behavior for the society, or strike down the otherwise constitutional actions of a coequal branch of government — we approach what Madison described as "the very definition of tyranny": the "accumulation of all powers ... in the same hands."[71]

Rather, the institution of judicial review is at once more limited, and more critical to our democracy — holding the Government itself accountable to Law, while taking care not to intrude upon any actions by the Legislature or Executive which do not violate the constitution, or any provision of enacted law. Thus, while the final arbiters of what a provision of law actually means, courts may not presume to judge the merits of an action by a coequal branch of government — nor whether a particular decision is wise, foolish or unfair — but must confine their inquiry to whether a challenged action constitutes an abuse of power, by determining whether a legislative or executive

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consequence ... would be the substitution of their pleasure to that of the legislative body."

[70]Const 1963, Art VI, §1.

[71]THE FEDERALIST, No 47.

action is "unconstitutional, illegal, or ultra vires."[72] To preserve the character of our democracy, and whatever the temptations luring the judge toward interference in the realm of substantive law, courts must consciously undertake to allow the representative branches of government — or the People, speaking directly through their adopted constitution — to settle all questions of policy. Therefore, to be true to its proper role in a democracy, courts must ensure that their decisions reflect the Law passed on to them by duly enacted statutes or constitutions, and not the subjective policy preferences of the individual judge who is charged with deciding the case.

2. The Common Law, the Judicial Power, and the Criminal Law

The common law provides no authority for the judiciary to make law-changing decisions in the area of substantive criminal law. This is so because the power to define crimes and ordain punishments is a Legislative, rather than a Judicial function,[73] and the Judiciary is not free to amend a penal statute to conform to its own preferences on matters of public policy. Justice Campbell stated long ago that "Whatever elasticity there may be in civil matters, it is a safe and necessary rule that criminal law should not be tampered with except by legislation."[74]

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[72] *Cf. People v Barksdale*, 219 Mich App 484, 488 (1996). *See also, House Speaker v Governor*, 443 Mich 560 (1993); *Schwartz v City of Flint*, 426 Mich 295 (1986).

[73] As stated by Justice Campbell in *In re Lamphere*, 61 Mich 105, 108 (1886): "While we have kept in our statute-books a general statute resorting to the common law for all nonenumerated crimes, there has always been a purpose in our legislation to have the whole ground of criminal law defined, as far as possible, by statute. *There is no crime whatever punishable by our laws except by virtue of a statutory provision*" (emphasis added).

[74] 61 Mich at 109-110. For a discussion of this entire area see Baughman, "Michigan's 'Uncommon Law' of Homicide," 7 Cooley L Rev 1 (1990).

But as we need a common language to express ideas, by necessity penal legislation will employ terminology with an understood or settled common-law meaning. And it has long been settled that when a legislature enacts a statute employing a well-understood and recognized common-law term, the legislature "intended no alteration or innovation of the Common Law not specifically expressed" — and, in fact, "it is never to be presumed that the Legislature intended to make any innovation upon the common law any further than the case absolutely require[s] in order to carry the act into effect."[75] This principle applies in criminal cases, for once the Common Law definition of a term has been determined, then where "the legislature [shows] no disposition to depart from the common-law definition,... it remains."[76] The use of a common-law term without alteration enacts the meaning of that term into statutory law as much as if the legislature had spelled out the common-law meaning in detail in the statute, and the Judiciary may not alter or amend its meaning without engaging in an act of legislating, in violation of the state constitution.[77]

Given our system's bedrock principle of separated powers, that the judiciary is not free to alter the meaning of a penal statute merely by deciding as a matter of policy that a term employed in the statute ought now to mean something other than it meant at the time of the statute's enactment strikes *Amicus* as self-evident. To allow the judiciary to change the meaning of statutes in this

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[75] *Wales v Lyon*, 2 Mich 276, 283 (1851). See also *Garwols v Bankers Trust*, 251 Mich 420 (1933).

[76] *People v Schmitt*, 275 Mich 575 (1936). See also *People v Utter*, 217 Mich 74 (1921); *People v Potter*, 5 Mich 1 (1858).

[77] Const 1963, Art III, §2. *See also People v Couch*, 436 Mich 414, 420 (1990)(Noting that in enacting the murder statute with no alteration of the common law definition the legislature had "adopt(ed) and "embrace(d)" the common law definition, raising significant question of "whether this Court still has the authority to change those definitions").

manner is to give the judiciary a legislative role, allowing it to alter or amend statutes[78] — which appears to violate Article III, §7 of the State Constitution, which provides that "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."[79] Simply put, as the criminal law is now entirely a creature of statute; and as there is no authority for this Court to enact or amend laws on rape, burglary, or homicide, there is just as little apparent source for the Judiciary to create criminal defenses as to enact criminal offenses: the authority for both, it seems to *Amicus*, springs from thin air, rather than this Court's constitutional mandate.[80]

Michigan is a common-law jurisdiction, the Common Law being adopted in the Northwest Ordinance of 1787, and carried forward by every Michigan Constitution.[81] The Common Law adopted here is the "English common law, unaffected by statute."[82] And entrapment was unknown in the English common law, as "[n]one of the English writers on criminal law, ancient or modern,

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[78] This Court has on at least two occasions amended the homicide statute by altering the meaning of a common-law term employed without modification–and thereby embraced and enacted–by the legislature. *See, People v Aaron*, 409 Mich 672 (1979); *People v Stevenson*, 416 Mich 383 (1982). But this is no ground for this Court to continue the error by asserting power without authority in modifying the meaning of criminal statutes. *See, People v Couch, supra* (Opinion of Boyle, J).

[79]Const 1963, Art III, §7.

[80]*Cf. People v Couch, supra* (Declining to rewrite Michigan law on homicide).

[81]Mich Const 1835, schedule, § 2; Mich Const 1850, schedule, § 1; Mich Const 1908, schedule, § 1, Mich Const 1963, Art III, § 7.

[82] *In re Lamphere*, 61 Mich 105, 108 (1886).

mentions entrapment as a defense to a charge of crime."[83] Unlike defenses such as duress, the source of entrapment is found nowhere in the common law, nor does it have a statutory or constitutional source. Rather, it is entirely a judicial creation, crafted well after the Legislature had asserted its role in setting public policy: but since the defense did not exist at common law, its creation is simply an exercise of raw power.

In Michigan, we have yet to confront the absence of a principled basis for using entrapment to bar a criminal prosecution — the decision of a coequal branch of government — other than by the exercise of power. In fact, the multiple opinions in *Jamieson* and *Julliet*, and the Court of Appeals' attempt to unravel those opinions in *Fabiano*, illustrate the policy considerations and decisions inherent in the defense. This court has wrestled over the years with many thorny and perplexing questions that cut to the heart of the defense, including:

- Is the defense "subjective," focusing on the predisposition of the defendant, or "objective," focusing on governmental conduct?
- Perhaps the defense has both "subjective" and "objective" components, but how should we define them?
- Should the defense be a question of fact for the jury, or a question of law for the court?
- What are the appropriate the standards are for assessing predisposition and for assessing the nature of the governmental conduct?

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[83] Mikell, "The Doctrine of Entrapment in the Federal Courts," 90 Pa L Rev 245, 245-246 (1942). *See also*, Wharton, 1 CRIMINAL LAW (8TH ED, 1880) 142. Compare, Wharton, 1 CRIMINAL LAW (10TH ED, 1896) 166:

These are, it seems to *Amicus*, quintessential questions of public policy that properly belong to the political branches of government.[84]

It follows, as a matter of simple logic, that as this Court was without authority to enact the defense, it is without authority to enforce it. Consequently, the appropriate action for this Court is to reverse the lower courts' judgment in this matter — on grounds that the trial court exceeded its authority in dismissing the charges against Defendant on grounds of entrapment.

In the event that this Court disagrees, however, *Amicus* has a few additional thoughts on the appropriate resolution of the present case.

D. A Citizen's Look at Entrapment

Michigan is among the handful of states employing the "objective" test for entrapment, and has considered and declined past invitations to align itself with the majority of states that defer such questions to the factfinder for resolution.[85] *Amicus* will not risk boring this Court by attempting to duplicate the exemplary efforts of the People on the proper application of entrapment principles to the facts of the instant case, and defer to their fine presentation on the matter. *Amicus* does, however, wish to bring some facets of the case to the Court's attention that might otherwise pass without notice.

The heart of the objective test of entrapment is a steely assessment of the effect of police officer's conduct on a hypothetical person, to see whether the conduct at issue poses a significant

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[84]Const 1963, Art III, §2.

[85]*See, eg, People v Jamieson, supra* at 79-80.

risk of enticing an otherwise law-abiding person, not previously disposed to disobey the law, into committing a crime.[86] But it seems to *Amicus* that the proper focus of the court — the effect of police conduct a reasonable, law-abiding citizen — has become lost over the years in a cloud of self-interest: unless well-defined, "reprehensibility," like beauty, will always be in the eye of the beholder; and in any case, the second prong of *Juillet* — the prong inviting review for some amorphous "reprehensibility" that courts will know when they see — strikes *Amicus* as quite redundant: police conduct will be "reprehensible" if it poses a risk of luring a law-abiding citizen into committing a crime. While human imagination can always devise new forms of inducements, what is likely to strike a reasonable citizen as "reprehensible" is likely to be a rather short list — and will invariably qualify as entrapment under any objective standard, as well:

- An appeal to human decency or pity will be "reprehensible."[87]
- An attempt to prey upon the particular needs or weaknesses of the "target" will be reprehensible.[88]
- Any use of duress to coerce the "target" into complying will be reprehensible.[89]

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[86]*People v Juillet, supra* at 54-57; *People v Jamieson, supra* at 74, 80.

[87]To cite just one example: "Please help me...my baby is dying and I need to raise $50,000 to pay for her operation" would strike most objective observers as "reprehensible," since it would be using human decency and sympathy as the means to induce commission of a crime. But it since it would pose a significant risk of inducing an otherwise law-abiding citizen into doing something rash to help another human being, it would also qualify as "entrapment" under *Juillet*'s first prong, as well.

[88]The prototypical example: "Oh...your mother is dying of cancer and you need a quick $50,000 to pay for her operation? Have I got a deal for you...."

[89] Among the milder examples: "So you want me to stop calling you twenty times a day at all hours of the day and night? Well then...here's what I want you to do..."

With due respect to the lower courts in this matter, the facts of this case appear to present nothing approaching an inducement to commit a crime — and the only "reprehensibility" apparent in the record is found in Defendant's behavior, not that of the police. Let us contrast Defendant's behavior in this case to what the response of a "typical, law-abiding citizen"would be to the following offer:

UNDERCOVER COP:	Hey...why don't you come with me and help me pick up my shipment of illegal drugs? You can check things out to make sure that the drugs are okay. And I'll pay you $1,000.
DEFENDANT:	Sounds good to me....

A typical, law-abiding citizen's answer may vary in tone, intensity, and the colorfulness of vocabulary. However, it will be some variation on the following:

UNDERCOVER COP:	Hey...you want to come and help me take my drug shipment? I need someone to help make sure that the drugs are okay. You'll make tons of money, you know....
LAW-ABIDING CITIZEN:	*No!!!* Are you crazy????

If we contrast Defendant's response to that of the "typical, law-abiding police officer," the contrasts are even more startling:

UNDERCOVER COP:	Hey, Fred-O. Just give the drugs to my man over there. (pointing to Defendant). He's my protection for this delivery. Why don't you hand the drugs to him?
COP'S TRUSTY SIDEKICK:	Okay...here you go.
DEFENDANT:	Thanks.

Comparing Defendant's response to what we would expect from a police officer, sworn to uphold the Law, we see the basis for an entrapment claim evaporate entirely:

UNDERCOVER COP:	All right, here's your money. Just hand the drugs over to my man over there.
TRUSTY SIDEKICK:	Here you go, fella....
TYPICAL LAW-ABIDING COP:	All right --- *freeze* !!!! (Gesturing with gun). You're all under arrest !!!
UNDERCOVER COP:	*Whoa* — watch where you point that thing, Champ. Looks like we're all on the same side, here....

It seems to *Amicus* that merely offering a citizen the opportunity to engage in criminal activity does not constitute entrapment.[90] But using entrapment to bar prosecution of a police officer who is allowing his property to be used to facilitate the narcotics trade — and willing attend a drug delivery in order to provide protection to an ostensible drug dealer who requests it — is turning the defense upon its head: rather than looking to whether the police conduct at issue poses a threat of inducing an innocent person into committing a crime, the lower courts appear concerned mostly with whether the police acted to minimize any adverse consequences to Defendant. As the dissent noted below, the police did not target Defendant merely to test him: they received information that a corrupt police officer was using his office to provide protection and information to drug dealers within their jurisdiction; and Defendant eagerly agreed to take a more active role in the undercover sting, even after being given the chance to decline.

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[90]THE ENTRAPMENT DEFENSE, *supra* at 120. *See also, United States v LaFreniere, supra; United States v McKinley, supra; State v Graham, supra.*

Under the circumstances, using the doctrine of entrapment to insulate a corrupt police officer from the consequences of his own actions strikes *Amicus* as more than a correctable error in applying the defense: it illustrates the inherent weaknesses in the entire defense, and suggests the need for judicial restraint. At the least, this Court should be reluctant to intrude upon the prerogatives of another branch of Government without a clear basis in law: this Court is not, after all, charged with finding and apprehending lawbreakers; it is charged with determining their guilt or innocence. And just as the Executive must refrain from functioning as prosecutor, judge, and jury, this Court should be reluctant to stray beyond its own jurisdiction, constitutional mission, and areas of expertise. Accordingly, whether this Court chooses to apply the "objective" test, the "subjective" test — or return to traditional notions of personal responsibility, reject the entrapment defense entirely, and return to the Common Law view that any question of "entrapment" is a factor in mitigation of sentence, rather than an excuse for breaking the law — it is clear that nothing in the record is sufficient to justify or excuse Defendant's actions in this case.

E. Conclusion

Barring prosecutions on the basis of "reprehensible police conduct" requires the Court to determine not only that the actions of another branch of government are unwise, but that they are so irresponsible as to justify seizing the prerogatives of another branch of government in the name of morality, and vetoing actions by the Executive without any warrant in Constitution, or any statute, to do so. But when the "moral choice"guiding the Court stems not from some source of law, but from its own conscience, then for the Court to make "moral choices" is for the court to engage in political conduct, and not the exercise of judicial power. With great difficulty, and without a clear

consensus on what constitutes good, or wise police practices, this Court has tried to identify, consider, and resolve the moral and political choices needed to determine when law-enforcement executive techniques constitute overreaching, choices which belong to others to make. Many jurisdictions have made these decisions through legislation, and if Michigan's Legislature enacted a form of entrapment defense of its choosing — or chose to abrogate the entrapment defense in this State entirely — then its exercise of Legislative power would govern.

Comparing the entrapment defense with a "true" common-law defense, duress, reveals some of the difficult choices involved — many of which, this Court has yet to confront. One who engages in criminal conduct under duress is not relieved of the consequences unless threatened with imminent death or great bodily harm — and if the offense committed is homicide, even that duress is inadequate to relieve criminal responsibility. But in Michigan, even if one is predisposed to commit a crime, if the act is in some vaguely-defined sense "instigated" by a government agent under circumstance in which a judge, applying some vaguely-defined standards, finds "reprehensible," then prosecuting the crime — an action undertaken by a coequal branch of government — is simply barred, regardless of the lack of any authority for this exercise of raw judicial power.

The conclusion is inescapable that the Judiciary has invented the entrapment defense as a means of exercising superintending control over conduct by the Executive Branch that judges find distasteful. In such cases, however, the consequence is that the Judiciary declines to fulfill its proper judicial role in our system of government — determining the guilt or innocence of the accused — in order to vent its displeasure. *But decisions in the conduct of criminal investigations belong to the* Executive Branch — within legal limits set by the Legislative Branch. And unless Executive Branch

actions violate the Constitution, a statute, or some common-law principle, there is nothing for this Court to review — except the question of the accused's guilt or innocence.

Amicus submits that unless this Court can discover and articulate some rightful authority for a defense of judicial nullification, the Court should abrogate the defense of entrapment as unsupported by law and a violation of separation of powers. The matter should be left to the Legislature — which may decide to enact an objective test, a subjective test, a hybrid test, or no entrapment defense at all. But in the present case, this Court should reverse the lower court decision to dismiss the charges against Defendant on grounds of entrapment for lack of authority; and even this Court determines to follow *stare decisis* and apply some supervisory test to review the Executive Branch's investigation into allegations of Defendant's corrupt conduct as a police officer, there is no basis for dismissing the charges in this case, for the reasons stated in the excellent brief of the People of the State of Michigan.

RELIEF

WHEREFORE, this Court should reverse the trial court's order dismissing the case, and remand the cause for further proceedings.

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Dated: February 6, 2002

JC/lw
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